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Before the  
**FEDERAL COMMUNICATIONS COMMISSION**  
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MAY - 4 1998

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

In the Matter of )  
 )  
Assessment and Collection )  
Of Regulatory Fees for ) MD Docket No. 98-36  
Fiscal Year 1998 )

To: The Commission

**REPLY COMMENTS OF BELL SOUTH CORPORATION**

BellSouth Corporation, on behalf of itself, BellSouth Cellular Corp. and BellSouth Wireless Data, L.P. ("BellSouth WD") (collectively, "BellSouth"), by its attorneys, hereby respectfully submits reply comments in the above-captioned proceeding. BellSouth is supportive of the comments filed by the Personal Communications Industry Association ("PCIA"), which, in part, ask that the Commission provide the data upon which the Commission compiled the regulatory fees for the CMRS Mobile Services and CMRS Messaging Services and question the magnitude and the need for the increases in the CMRS categories. BellSouth also wants to emphasize BellSouth WD's comments in this proceeding that seek a reclassification of 900 MHz SMR systems into the CMRS Messaging Services category or creation of a new category that recognizes the unique position of the 900 MHz SMR systems in the mobile communications marketplace.

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**THE COMMISSION'S METHODOLOGY FOR CALCULATING FEES FOR CMRS PROVIDERS APPEARS TO BE IN CONFLICT WITH SECTION 9 OF THE ACT**

PCIA in its comments expresses its concern and dismay at the proposed percentage increases in the regulatory fees to be paid by the CMRS industry. As calculated by PCIA,<sup>1</sup> the Commission's own estimates evidence expected increases of 43% and 14% for the CMRS Mobile Services and CMRS Messaging Services regulatory fee categories, respectively.<sup>2</sup> Congress only dictated a 7% overall increase in the total amount of regulatory fees to be collected in Fiscal Year 1998.<sup>3</sup> However, PCIA is troubled not just with the magnitude of the increases but also with the Commission's decision to withhold from public scrutiny the underlying data it ostensibly relied upon in making its calculations.<sup>4</sup>

PCIA seeks detailed information on, among other things: how full-time equivalent ("FTE") employees "are used in calculating regulatory fees under the Commission's cost accounting system;"<sup>5</sup> "how the Commission factors contract personnel compensation in calculating the number of FTE employees;"<sup>6</sup> what training measures have been put in place to insure the integrity of the time reporting data by

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<sup>1</sup> See Comments of the Personal Communications Industry Association, filed Apr. 22, 1998 ("PCIA Comments"), at 2.

<sup>2</sup> *Assessment and Collection of Regulatory Fees for Fiscal Year 1998*, MD Docket No. 98-36, FCC 98-40, *Notice of Proposed Rulemaking*, released Mar. 25, 1998 (the "NPRM"). The NPRM was published on April 2, 1998, 63 FR 16,188 (1998).

<sup>3</sup> *Id.*, at ¶2.

<sup>4</sup> See PCIA Comments, at 3-15

<sup>5</sup> *Id.*, at 4.

<sup>6</sup> *Id.*, at 6.

permanent and contract employees;<sup>7</sup> and the extent of cross-subsidization within and among service categories.<sup>8</sup>

PCIA is correct to request this level of detail. The Commission informs the public that its cost accounting system “separately identifies direct and indirect costs.”<sup>9</sup> It is these inputs that the Commission utilizes in its calculations. The payers of the regulatory fees are not made privy to the details of the costs so identified. However, even if the fee payers knew those inputs, they still would not have the full picture because the output from the calculation of regulatory costs is further adjusted “based upon the public interest and other criteria established in 47 U.S.C. 159(b)(3).”<sup>10</sup> The Commission has not disclosed what public interest considerations it takes into account in determining what adjustments are to be made to the calculations.<sup>11</sup>

Disclosure of the basic data is essential to any evaluation of the system employed for the development of the regulatory fees. However, such disclosure only will result in a full understanding of the cost allocation methodology used by the Commission if there is a similar exposition of the public interest factors applied in the adjustment process described in the *NPRM*.

Underlying PCIA’s plea for full disclosure appears to be its belief that “fee payers are afforded no judicial review” of changes in the fees.<sup>12</sup> Section 9(b)(2) of the

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<sup>7</sup> See PCIA Comments, at 6-10.

<sup>8</sup> *Id.*, at 11.

<sup>9</sup> *NPRM*, at ¶16, n.4.

<sup>10</sup> *Id.*, at ¶20.

<sup>11</sup> Review of those public interest considerations might shed light on why the CMRS Mobile Services fee category has “Adjusted activity costs” of \$12,201,768, but an “Expected FY 1998 revenue” burden of \$16,191,466. See *NPRM*, Attachment E.

<sup>12</sup> See PCIA Comments, at 4, n.14.

Communications Act of 1934, as amended (the “Act”), includes the exact verbiage found in section 9(b)(3) of the Act that purports to preclude judicial review of the Commission’s actions taken pursuant to the paragraph,<sup>13</sup> *i.e.*, “Increases or decreases in fees made by adjustments pursuant to this paragraph shall not be subject to judicial review.”<sup>14</sup>

Recently, the United States Court of Appeals for the District of Columbia Circuit, in addressing an appeal of an action taken by the Commission under section 9(b)(3) of the Act, found that the “no-review provision of section 9, . . . merges consideration of the legality of the Commission’s action with consideration of this court’s jurisdiction in cases in which the challenge to the Commission’s action raises the question of the Commission’s authority to enact a particular amendment.” *Comsat Corp. v. F.C.C.*, 114 F.3d 223, 227 (D.C. Cir. 1997) (“*Comsat*”). The Court did state that “there are numerous amendments that could be made consonant with the terms of § 159(b)(3) that would not be subject to judicial review. For example, an amendment to increase the amount of an existing fee—for a statutorily permissible reason—would be covered by section 9.” *Id.* Thus, to withstand judicial review, the Commission’s actions in implementing the *NPRM* must be in concert with its statutory mandate not only to collect “an aggregate amount of fees . . . that can reasonably be expected to equal the aggregate amount of fees that are required to be collected by appropriations Acts”<sup>15</sup> but also “to take into account factors

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<sup>13</sup> See 47 U.S.C. § 159(b)(2) and (3) (1997).

<sup>14</sup> See 47 U.S.C. § 159(b)(2) and (3) (1997).

<sup>15</sup> See Section 9(b)(2)(B) of the Act, 47 U.S.C. § 159(b)(2)(B) (1997).

that are reasonably related to the benefits provided to the payor of the fee by the Commission's activities."<sup>16</sup>

In effect, PCIA is arguing that, absent the information it is requesting, no determination can be made that the Commission is acting within its statutory mandate. BellSouth agrees.<sup>17</sup> If the Commission eschews the opportunity to inform fully the regulatory fee payers and the public about its cost recovery system, the inputs to it, and the public interest factors used to adjust the outputs of the system, it runs the risk of judicial review of its actions. A detailed exposition of the entire process of fee calculations and adjustments is warranted.

### **900 MHZ SMR SYSTEMS HAVE NOT BEEN CLASSIFIED PROPERLY BY THE COMMISSION**

BellSouth WD, Paging Network, Inc. ("PageNet"), and Small Business in Telecommunications ("SBT") all agree that the Commission's CMRS Mobile Service fee category is overly inclusive and, as a result, that it unfairly burdens systems classified as CMRS Mobile Services that do not compete with true broadband services offering real-time, two-way voice service. BellSouth WD, PageNet and SBT differ only as to the solution.

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<sup>16</sup> See Section 9(b)(1)(A) of the Act, 47 U.S.C. § 159(b)(1)(A) (1997); *Comsat*, *supra* at 227.

<sup>17</sup> While the total for all regulatory fees correctly sums arithmetically, individual fee categories do not add up when compared to their "adjusted activity costs." For example, the activity costs of "international circuits" equal \$8,933,157, yet they are projected to generate only \$1,950,000 in regulatory fees, a -458% difference, and IVDS, which has adjusted activity costs of \$2,297,206, will have no fee requirement. There are other instances of equally unexplained differences. See *NPRM*, Attachment E.

PageNet notes that there are fundamental differences – both in terms of the markets in which they compete and the regulatory resources they consume – between voice and non-voice mobile services. PageNet urges, therefore, that the Commission create a fee “sub-category for non-voice networks and services within the CMRS Mobile Services fee category.”<sup>18</sup>

Although the PageNet suggestion mirrors in some respects BellSouth WD’s alternative suggestion that the Commission create a third fee category for “CMRS Broadband Messaging Services,” the basis for distinguishing between CMRS Mobile Services and the new fee category suggested by PageNet – voice versus non-voice – would necessarily involve the Commission in the kind of carrier-by-carrier classification scheme that it has declined to adopt.

By contrast, BellSouth WD’s position that 900 MHz SMR systems should be recategorized, either as CMRS Messaging Services or in a new category, does not require carrier-by-carrier classification, but depends entirely upon the predominate use and licensing of the band in question. For instance, 900 MHz SMR operators simply cannot aggregate enough spectrum to compete with cellular, 800 MHz SMR, or broadband PCS services.

Similarly, BellSouth WD’s proposal avoids potential misclassifications that could result if SBT’s proposal were adopted. SBT has suggested that, because narrowband PCS services, which the Commission has classified as CMRS Messaging Services, are

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<sup>18</sup> Comments of PageNet at 3.

authorized with bandwidths of up to 50 kHz per channel, the Commission should reclassify as CMRS Messaging Services all mobile services licensed to use channels with bandwidths of 50 kHz or less.<sup>19</sup> Although 900 MHz SMR systems would benefit from this approach, it may itself be overly inclusive. Channel bandwidth alone does not determine the fundamental character of the services that may be *offered* on a mobile system.

Nonetheless, the common problem recognized by BellSouth WD, PageNet and SBT should not be obscured by differences in the proposed solutions. The fact remains that there is a gross disparity built into the Commission's current CMRS fee schedule. Accordingly, 900 MHz SMR systems, such as those operated by BellSouth WD, should not be required to pay regulatory fees that are more than seven times those paid by the narrowband PCS systems with which they compete. There is no legal or equitable justification for such unequal regulatory treatment.

## CONCLUSION

BellSouth respectfully submits that the methodology the Commission has employed for calculating the regulatory fees for CMRS providers appears to be in conflict with Section 9 of the Act. Indeed, in many instances, the great disparity between regulatory costs and revenue requirements suggests that the Commission's system is not working equitably. Moreover, a full exposition of the facts underlying the Commission's calculations likely would permit interested parties to analyze and comment upon the

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<sup>19</sup> See Comments of SBT at 5.

degree to which the system complies with the statute. BellSouth also wants to emphasize BellSouth WD's request that 900 MHz SMR systems should be recategorized either as CMRS Messaging Services or placed in a new category of CMRS Broadband Messaging Services that recognizes the unique position of the 900 MHz SMR systems in the mobile communications marketplace and reduces the fees to paid by these systems.


Respectfully submitted,

BELLSOUTH CORPORATION



William B. Barfield  
M. Robert Sutherland  
David G. Richards

1155 Peachtree Street, N.E.  
Suite 1800  
Atlanta, GA 30319-5239  
(404) 249-4839



David G. Frolio

1133 21<sup>st</sup> Street, N.W.  
Suite 900  
Washington, DC 20036  
(202) 463-4182

May 4, 1998

Its Attorneys



CERTIFICATE OF SERVICE

I do hereby certify that a copy of the foregoing REPLY COMMENTS OF BELLSOUTH CORPORATION has been sent this 4<sup>th</sup> day of May, 1998, to the below listed individuals by United States first class mail, postage prepaid, unless otherwise indicated\*.

\*Magalie Roman Salas  
Secretary  
Office of the Secretary  
Federal Communications Commission  
1919 M Street, N.W., Room 222  
Washington, DC 20554

Judith St. Ledger-Roty  
Paul G. Madison  
Kelley, Drye & Warren LLP  
1200 19<sup>th</sup> Street, N.W.  
Washington, DC 20036

Sue D. Blumenfeld  
Jennifer D. McCarthy  
Willkie Farr & Gallagher  
Three Lafayette Centre  
1155 21<sup>st</sup> Street, N.W.  
Washington, DC 20036-3384

Richard R. Zaragoza  
David D. Oxenford  
Fisher Wayland Cooper Leader & Zaragoza L.L.P.  
2001 Pennsylvania Avenue, N.W., #400  
Washington, DC 20006-1851

Peter A. Rohrbach  
Karis A. Hastings  
Hogan & Hartson L.L.P.  
555 Thirteenth Street, N.W.  
Washington, DC 20004

Philip V. Otero  
Senior Vice President and General Counsel  
GE American Communications, Inc.  
Four Research Way  
Princeton, NJ 08540

Raul R. Rodriguez  
David S. Keir  
Leventhal, Senter & Lerman, P.L.L.C.  
2000 K Street, N.W., Suite 600  
Washington, DC 20006

Henry L. Bauman  
Jack N. Goodman  
National Association of Broadcasters  
1771 N Street, N.W.  
Washington, DC 20036

Stephen L. Goodman  
Halprin, Temple, Goodman & Sugrue  
Suite 650 East Tower  
1100 New York Avenue, N.W.  
Washington, DC 20005

Christopher D. Imlay  
General Counsel  
The American Radio Relay League, Inc.  
225 Main Street  
Newington, CT 06111

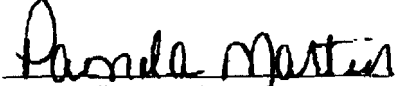
Booth Freret Imlay & Tepper, P.C.  
5101 Wisconsin Avenue, N.W.  
Suite 307  
Washington, DC 20016-4120

Lon Levin, SIA Co-Chair  
Gerald Musarra, SIA Co-Chair  
Clayton Mowry, SIA Director  
Satellite Industry Association  
225 Reinekers Lane, Suite 600  
Alexandria, VA 22314

Mark J. Golden, Senior Vice President, Industry Affairs  
Robert Hoggarth, Senior Vice President, Paging and Narrowband  
Cynthia S. Thomas, Director, Regulatory Affairs  
Personal Communications Industry Association  
500 Montgomery Street  
Suite 700  
Alexandria, VA 22314-1561

Jonathan Wiener  
W. Kenneth Ferree  
Goldberg, Godles, Wiener & Wright  
1229 Nineteenth Street, N.W.  
Washington, DC 20036

Dennis C. Brown  
Brown and Schwaninger  
1835 K Street, N.W.  
Suite 650  
Washington, DC 20006

  
Pamela Martin

\* Hand delivery